STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2006
v	No. 258630 Wayne Circuit Court
JAMAL DUQUON GARTH, Defendant-Appellant.	LC No. 04-004412-01

Before: Owens, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b, and assaulting, resisting, and obstructing a police officer, MCL 750.81d(1). Defendant was sentenced to two to five years' imprisonment for the felon in possession of a firearm conviction, two years' imprisonment for the felony-firearm conviction, and one to two years' imprisonment for the assaulting, resisting, and obstructing a police officer conviction.[1] We affirm.

Early in the morning of July 30, 2003, a car stopped alongside the patrol car of Sergeant Kevin Holton of the Inkster Police Department. The driver, Jeffrey Davis, pointed to a blue Chevrolet Cavalier traveling nearby and told Holton that the driver of that car was chasing him. After Holton effectuated a traffic stop of the Cavalier, the driver exited the vehicle and walked toward Holton with his hands in the air. Holton told the driver to turn around. As he began to search him for weapons, the driver fled. Holton pursued the driver as he ran to a wooded area. Both men became entangled in vines, but the driver freed himself and fled the area. Holton returned to the Cavalier. Through the open driver-side door, he saw a loaded semi-automatic handgun on the floor. Holton identified defendant as the driver. Other witnesses identified the driver of the Cavalier as defendant's half-brother, Kue Sean Manson.

[1] Defendant's sentences for the felon in possession of a firearm conviction and the assaulting, resisting, and obstructing a police officer conviction are concurrent. Defendant's sentence for the felony-firearm conviction is consecutive to his other sentences.

Defendant argues that he was denied effective assistance of counsel because his trial counsel failed to subpoena witnesses and documentary evidence that would have exculpated him. In particular, defendant argues that trial counsel failed to pursue exculpatory information held by Nakia Livingston and her family members. We disagree. Because the trial court denied defendant's motion for a new trial or a *Ginther* hearing, review is limited to the existing lower court record. *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We first determine the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* Factual findings are reviewed for clear error, while constitutional determinations are reviewed de novo. *Id.* There is a strong presumption that defendant received effective assistance of counsel, and the burden is on defendant to prove that his counsel's actions did not constitute sound trial strategy. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

To prevail on a claim of ineffective assistance of counsel, defendant must show that his attorney's performance fell below an objective standard of reasonableness and that this representation was so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To establish that his counsel's performance was deficient, "a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant's counsel's representation would deprive defendant of a fair trial if, but for his counsel's errors, the result of the trial would have been different. *Id*. at 302-303. Decisions regarding whether to call witnesses are presumed to be questions of trial strategy. *Mitchell*, *supra* at 163. "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Robert Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990).

We conclude that defendant failed to establish that his trial counsel's failure to call Livingston and her family members as witnesses was not a strategic decision and deprived defendant of a substantial defense. Livingston was included on defendant's witness list, and at the hearing concerning his motion for a *Ginther* hearing, defendant's counsel noted that his trial counsel did not call Livingston because her testimony would largely consist of inadmissible hearsay statements and because he believed that she was a poor witness.

Further, according to the handwritten statements provided by Livingston, her cousin, and her aunt, if these witnesses had been called at trial, they would have testified that Manson called Livingston on the night in question for a ride to her aunt's home after fleeing from police during a traffic stop. However, this information is cumulative to other testimony presented before the trial court. Defendant's girlfriend, Porsche Love, testified that she was with Davis on the night of the incident and that Manson was the driver of the Cavalier. Both Love and defendant's mother also testified that defendant's mother owned the Cavalier and permitted Manson, but not defendant, to drive the Cavalier because defendant's license had been suspended. Defendant's mother also testified that she told Manson to turn himself in, and that she had no contact with Manson after the night of the incident and does not know how to reach him.

Further, defendant presented evidence that he was not driving the Cavalier on the night in question. Morris and defendant testified that defendant was at Morris' apartment on the night in question and that Love arrived at the apartment about 2:00 a.m. or 3:00 a.m. to discuss the incident with defendant. Defendant also claimed that he did not leave the apartment until his mother picked him up the following morning.

Despite the testimony of these witnesses, the jury found defendant guilty. Defendant has failed to show that presenting additional witnesses providing similar testimony would have resulted in a different outcome. Further, although Livingston and her family members also claim that Manson disclosed that he had been stopped by police and fled on foot because he was concerned that police would discover a handgun in his car, these are hearsay statements, and defendant fails to explain if these statements would be admissible under a hearsay exception. Defendant fails to establish that trial counsel's decision not to call Livingston and her family members as witnesses did not constitute sound trial strategy, and we will not substitute our judgment for that of counsel in matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Accordingly, we conclude that defendant's trial counsel was not ineffective for failing to call Livingston and her family members as witnesses.

Defendant notes briefly that a defense investigator had records concerning the hit-and-run automobile assault in which he was injured. However, no documents exist in the record regarding injuries that defendant suffered in an automobile accident before the incident in question. Again, we may only consider evidence in the record when determining if trial counsel was ineffective. *Ginther*, *supra* at 442-443. Further, although defendant presented testimony that he had been hit by a car before the incident and that his leg was injured on the night in question, he failed to show that documents corroborating this testimony would have changed the outcome of the trial or to establish that the documents contained additional information exculpating defendant. Accordingly, defendant fails to establish that his counsel's failure to offer these records concerning the hit-and-run accident as evidence affected the outcome of the trial and constituted ineffective assistance of counsel.

Defendant also argues that he was denied effective assistance of counsel because his trial counsel failed to present expert testimony concerning the unreliability of eyewitness identification in order to attack the credibility and weight of the identification testimony offered by Sergeant Holton. Although defendant provided extensive analysis concerning the unreliability of Holton's identification of defendant when arguing that the prosecutor committed misconduct by allegedly "coaxing" Holton to identify defendant as the perpetrator, he fails to present any analysis or citation to authority to support his assertion that his trial counsel failed to present a substantial defense when it did not call an expert witness to testify concerning the unreliability of Holton's identification. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Albert Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Because defendant fails to address this issue in his brief on appeal, he abandons this issue and we will not consider it further. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

Finally, defendant argues that the prosecutor committed misconduct when he used a single photograph to coax Holton toward a level of certainty about the perpetrator's identity, unfairly tainting the identification and the outcome of the trial, and that, consequently, the trial

court should have suppressed Holton's identification of defendant at trial. However, nothing in the lower court record indicates that Holton identified defendant as the perpetrator after viewing only defendant's photograph. This issue was never mentioned in either post-judgment hearing. This allegation seems to appear only in defendant's brief on appeal, and within that, defendant does not cite to any evidence on the record of this event. Therefore, defendant abandons this issue on appeal. *Albert Kelly*, *supra* at 640-641.

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Joel P. Hoekstra